

United States District Court

For the Northern District of California

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NOT FOR PUBLICATION

5

IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

7

8 ROBERTA SOHAL, et al.,

9

Plaintiffs,

No. C 11-01941 JSW

10

v.

**ORDER RESOLVING MOTIONS
FOR SUMMARY JUDGMENT**

11

FEDERAL HOME LOAN MORTGAGE
CORPORATION, et al.,

12

Defendants.

(Docket Nos. 87, 88)

13

14

INTRODUCTION

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This matter comes before the Court upon consideration of the motion for summary judgment or adjudication of claims, filed by Plaintiffs Roberta Sohal (“Sohal”) and Michael W. Wright (“Wright”) (collectively, “Plaintiffs”), and the motion for summary judgment or, in the alternative, for partial summary judgment filed by Defendants, Wells Fargo Bank, N.A. (“Wells Fargo”) and Federal Home Loan Mortgage Corporation (“Freddie Mac”) (collectively, “Defendants”). The Court has considered the parties’ papers, relevant legal authority, the record in this case, and it has had the benefit of oral argument.

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The Court HEREBY DENIES Plaintiffs’ motion, and GRANTS IN PART AND DENIES IN PART Defendants’ motion.

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BACKGROUND¹

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On or about December 11, 2007, Plaintiffs applied for and obtained a loan in the amount of \$417,000 from Wells Fargo to purchase property located at 8552 Briarwood Lane, Dublin, California (the “Property”). (Docket No. 87-2, Plaintiffs’ Request for Judicial Notice in

¹

The facts set forth herein are undisputed, unless otherwise noted.

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1 Support of Motion for Summary Judgment (“RJN in Supp.”), Ex. 1 (“Deed of Trust”); Docket
 2 No. 92, Declaration of Matthew Overton (“Overton Decl.”), ¶ 5. Ex A. (“Promissory Note”).)²
 3 Plaintiffs use the Property as a California-licensed Residential Care Facility for the Elderly.
 4 (RJN in Supp., Ex. 10 (Declaration of Michael Wright in Support of Application for Temporary
 5 Restraining Order (“TRO”) (“Wright TRO Decl.”), ¶¶ 1, 3); RJN in Supp., Ex. 11 (Declaration
 6 of Roberta Sohal in Support of Application for TRO (“Sohal TRO Decl.”), ¶¶ 3-5); Docket No.
 7 91, Declaration of Ian J. Da Cunha (“Da Cunha Decl.”), Ex. A (July 25, 2012 Deposition of
 8 Michael Wright (“Wright Depo. 7/25/12”) at 100:17-22.).

9 The Deed of Trust and the Promissory Note identify Wells Fargo as the Lender. (Deed
 10 of Trust at 2; Promissory Note at 1, § 1.) The Promissory Note provides that “the Lender may
 11 transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to
 12 receive payments under this Note is called the ‘Note Holder.’” (Promissory Note at 1, § 1.) It
 13 also provides that “a Mortgage, Deed of Trust or Security Deed (the ‘Security Instrument’),
 14 dated the same date as this Note, protects the Note Holder from possible losses which might
 15 result if I do not keep the promises which I make in this Note.” (Promissory Note at 3, § 10.)

16 In this case, the Security Instrument is the Deed of Trust. When Plaintiffs executed the
 17 Deed of Trust and the Promissory Note, Wells Fargo was the beneficiary and Fidelity National
 18 Title Insurance Company (“Fidelity”) was the Trustee. (Deed of Trust at 2.) According to the
 19 terms of the Deed of Trust:

20 Lender, at its option, may from time to time appoint a successor trustee to
 21 any Trustee appointed hereunder, by an instrument executed and
 22 acknowledged by Lender and recorded in the office of the Recorder of the
 23 county in which the Property is located. ... Without conveyance of the
 24 Property, the successor trustee shall succeed to all the title, powers and
 25 duties conferred upon the Trustee herein and by Applicable Law. This
 26 procedure for substitution of trustee shall govern to the exclusion of all
 27 other provisions for substitution.

28 ² Plaintiffs submit requests for judicial notice in support of their motion for summary judgment, and in opposition to Defendants’ motion for summary judgment. Defendants do not object to those requests. The documents are documents of which the Court can take judicial notice. See Fed. R. Evid. 201. The Court shall take judicial notice of the existence of the documents and the date on which they were recorded or filed. However, it shall not assume the truth of the facts therein. See, e.g., *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001); accord *Fontenot v. Wells Fargo Bank*, 198 Cal. App. 4th 256, 264-67 (2011).

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1 (Deed of Trust, at 16 § 24.)

2 On or about February 12, 2008, Wells Fargo sold the Promissory Note and the Deed of
3 Trust to Freddie Mac. (Docket No. 87-1, Declaration of Phillip G. Vermont in Support of
4 Motion for Summary Judgment (“Vermont Supp. Decl.”), ¶ 2, Ex. A (Freddie Mac Responses
5 to Special Interrogatories (“Freddie Mac ROSI”) 1, 3), Ex. C (Freddie Mac Responses to
6 Requests for Admissions (“Freddie Mac Resp. to RFA”) 2.A); Docket No. 90, Declaration of
7 Dean Meyer (“Meyer Decl.”), ¶ 5; Overton Decl., ¶ 7.) Wells Fargo continued to service
8 Plaintiffs’ loan on Freddie Mac’s behalf. (Meyer Decl., ¶¶ 6-7, Ex. A; Overton Decl., ¶ 8.)
9 Freddie Mac notified Plaintiffs of this fact in a letter dated May 18, 2010. (Meyer Decl., ¶ 7,
10 Ex. A; Freddie Mac Resp. to RFA 1.A.)

11 On December 12, 2008, Wells Fargo executed a limited power of attorney, in which it
12 appointed officers of Cal-Western Reconveyance Corporation (“Cal-Western”)
13 its true and lawful attorney in fact for, and in its name, place and stead, and
14 for its use and benefit, for every act customarily and reasonably necessary
15 and appropriate for: The execution, acknowledgment, recording and
16 delivery of beneficiary’s Substitution of Trustee, ... Notices of Default on
17 Mortgages, ...wherein the above named principal is the original or
18 substituted beneficiary *or servicing agent for the beneficiary*, ...

19 Giving and granting unto said attorney-in-fact full power and authority to
20 do and perform all and every act and thing whatsoever requisite and
21 necessary to be done to accomplish the foregoing as the principal above
22 named might or could do as if personally present.....

23 (Docket No. 89, Declaration of Yvonne Wheeler (“Wheeler Decl.”), ¶ 5, Ex. A (emphasis
24 added).)

25 Plaintiffs failed to make payments on the loan beginning in March 2010. (*See, e.g.*,
26 Wright TRO Decl., ¶ 4; Sohal TRO Decl., ¶ 7; Overton Decl., ¶ 9, Ex. C.) Plaintiffs attempted
27 to obtain a loan modification, and they hired a consultant to assist in these efforts. (Docket No.
28 95, RJN in Opp., Ex. 6 (Declaration of Taj Lockett (“Lockett Decl.”), ¶ 2); Da Cunha Decl., ¶ 3,
Ex. B (Deposition of Taj Lockett (“Lockett Depo.”) at 58:14-60:7); Overton Decl., ¶ 11.) On
April 6, 2010 and April 14, 2010, Ms. Lockett spoke with Wells Fargo representatives, who
advised her that Plaintiffs’ request for a loan modification was under review. (Lockett Decl., ¶¶

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1 6-7.) On or about April 22, 2010, Wells Fargo denied the request for a modification. (*Id.*, ¶ 8;
2 Overton Decl., ¶ 12, Ex. D.)

3 On or about June 11, 2010, Cal-Western, as Attorney-in-Fact for Wells Fargo, executed
4 a Substitution of Trustee, in which it purported to substitute itself as Trustee for Fidelity. That
5 document states that Wells Fargo is the “present beneficiary” under the Deed of Trust. It does
6 not state that Wells Fargo is a servicing agent for the beneficiary (Wheeler Decl., ¶ 8, Ex. D
7 (“Substitution of Trustee”).)

8 On or about June 19, 2010, Cal-Western, through LSI Title Company (“LSI”), signed a
9 Notice of Default, which was recorded on June 21, 2010. (*Id.*, ¶ 6, Ex. B.) The Notice of
10 Default specifies that Cal-Western “is either the original trustee, the duly appointed substituted
11 trustee, or acting as agent for the trustee or beneficiary under a deed of trust dated December 12,
12 2007.” (*Id.*)

13 Ms. Lockett attests that between June and August 2010, Wells Fargo representatives
14 advised her that the request for a modification was in active review, and she provided Wells
15 Fargo with additional information pertinent to Plaintiffs’ request for a modification. (Lockett
16 Decl., ¶¶ 11-14.) Mr. Overton, Wells Fargo’s Vice-President of Loan Documentation, attests
17 that Wells Fargo cancelled the requests for loan modifications on April 22, 2010, May 24, 2010,
18 and August 5, 2010. (Overton Decl., ¶¶ 1, 12, Ex. D.)

19 On September 22, 2010, Cal-Western recorded a Notice of Trustee’s Sale, which was
20 scheduled for October 12, 2010. (Wheeler Decl., ¶ 9, Ex. E.) However, during the time the
21 Plaintiffs attempted to obtain a loan modification, the parties postponed the Trustee’s Sale three
22 times: from October 12, 2010 to November 12, 2010; from November 12, 2010 to December
23 14, 2010; and from December 14, 2010 to January 13, 2011. (Wheeler Decl., ¶ 12, Ex. H.)

24 On October 20, 2010, Ms. Lockett spoke with a Wells Fargo representative named Jay.
25 (Lockett Decl., ¶ 18; Locket Depo. at 135:17-23; Overton Decl., ¶ 13, Ex. E (Transcript of
26 Recording dated October 20, 2010 (“10/20/10 Tr.”)).) Ms. Lockett testified that Jay told her
27 Plaintiffs were “preapproved for a loan modification with the terms of 30 years, monthly

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1 payment of 2695 (principal and interest, taxes and insurance) to begin February 1, 2011, and a
2 down payment of \$5,000.” (Lockett Depo. at 135:24-136:5.)

3 According to the transcript of the phone call, Jay stated that, with a down-payment of
4 \$5,000, to be paid before October 24, 2010, Plaintiffs pre-qualified for a loan modification, and
5 he referenced a payment of approximately \$2695.50, which would start in February 2011.
6 (10/20/10 Tr. at 36:10-37:9, 38:13-24.) Jay also stated that “if” Plaintiffs “were approved for
7 the modification, the delinquent payments will be added to [the] principal balance, and [the]
8 interest rate and loan term may be adjusted.” (*Id.* at 37:22-25.) Jay also stated that until
9 Plaintiffs returned certain information, Wells Fargo would not “be able to determine if [they]
10 qualify. Please remember that collection activity does continue during this process.” (*Id.* at
11 38:10-12.)

12 On October 20, 2010, Wells Fargo sent Wright a letter in which it stated that: “this letter
13 is not a guarantee or approval of the loan modification;” described the materials that would be
14 required to continue the review; and advised Wright that “until you are approved for a
15 modification, normal default servicing will continue which includes any foreclosure action that
16 may be in process. Foreclosure action will not be placed on hold until you have returned the
17 signed agreement and the required initial payment.” (Overton Decl., ¶ 14, Ex. F; Docket No.
18 97, Declaration of Michael Wright (“Wright MSJ Decl.”), ¶ 6, Ex. D-1.) According to Wright,
19 the letter did not include an agreement to sign. (Wright MSJ Decl., ¶ 7.)

20 On October 21, 2010, Wright sent Wells Fargo \$5,000. (Overton Decl., ¶ 16; Wright
21 MSJ Decl., ¶ 7, Ex. E-1.) Wright also attests that he had previously provided Wells Fargo with
22 much of the information it requested and that he included a recent pay stub with the \$5,000.
23 (Wright MSJ Decl., ¶ 7, Ex. E-1; *see also* 10/20/10 Tr. at 39:20-41:14 (discussing information
24 provided by Plaintiffs).)

25 On November 10, 2010, Wells Fargo sent Wright a letter in which it stated that it would
26 not be able to provide him with a loan modification, because he had not provided all of the
27 information it needed. (Overton Decl., ¶ 16, Ex. G.) Although Plaintiffs ultimately provided
28 Wells Fargo with the necessary information, on December 17, 2010, Wells Fargo sent Wright a

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1 letter, in which it advised him that Plaintiffs were not eligible for a loan modification, because it
2 was “unable to get [them] to a modified payment amount that [they] could afford per the
3 investor guidelines on [their] mortgage.” (*Id.*, ¶17, Ex. H.)

4 On January 11, 2011, Ms. Lockett spoke with a Wells Fargo representative named
5 Kevin about the Trustee’s Sale scheduled for January 13, 2011. (Lockett Decl., ¶ 22; Overton
6 Decl., ¶ 19, Ex. I (Transcript of Recording dated January 11, 2011 (“1/1/11 Tr.”).) Ms. Lockett
7 attested and testified that Kevin told her that the Trustee’s Sale was not scheduled and that
8 Plaintiffs needed to send more information to Wells Fargo. (Lockett Decl., ¶ 22; Lockett Depo.
9 at 175:19-23.) According to the transcript of the call, however, Kevin advised Ms. Lockett that
10 the Property was in “active foreclosure” and a Trustee’s Sale was scheduled for January 13,
11 2011. (1/11/11 Tr. at 5:13-21; *see also* Lockett Depo. at 228:5-19.)

12 Kevin also advised Ms. Lockett that, because of the time frame involved, Wells Fargo
13 could not conduct a further loss mitigation review and that she would need to contact the
14 foreclosure department to request that the Trustee’s Sale be postponed. Ms. Lockett responded
15 “okay.” (*Id.* at 16:6-23.) The foreclosure department advised Kevin that it would need updated
16 documents before it could request a postponement. (*Id.* at 19:7-10, 20:21-22:9.) Kevin relayed
17 that information to Ms. Lockett, and he also advised her that Wells Fargo could not guarantee
18 that the request would be processed before the Trustee’s Sale. Kevin then summarized the
19 substance of the conversation, and he reiterated that: (1) there was a Trustee’s Sale scheduled
20 for January 13, 2011; (2) Plaintiffs’ only option at that point was to request a postponement
21 through the foreclosure department; (3) he could not guarantee that the request for a
22 postponement would be granted. (*Id.* at 21:20-23:1, 24:9-25, 25:9-29:21, 33:10-34:9.)

23 Ms. Lockett called Wells Fargo on January 13, 2011, and she attests that she was
24 advised the Trustee’s Sale was halted. (Lockett Decl., ¶ 23.) Wells Fargo’s “Consolidated
25 Notes Log” reflects that, on that date, it advised Ms. Lockett that the Trustee’s Sale had not
26 been postponed. The information contained in the Consolidated Notes Log also suggests that,
27 when Ms. Lockett called Wells Fargo after the Trustee’s Sale, she was advised that she needed
28

1 to contact the foreclosure attorney. (Overton Decl., ¶ 20, Ex. J (Consolidated Notes Log at 2,
2 7).)

3 On January 13, 2011, Cal-Western executed an Assignment of Deed of Trust in favor of
4 Freddie Mac, which was recorded on January 25, 2011. (Wheeler Decl, ¶ 13, Ex. I.) The
5 Trustee's Sale went forward on January 13, 2011, and Freddie Mac purchased the Property.
6 (*Id.*, ¶ 14, Ex. J.) Plaintiffs state that they did not learn that the Trustee's Sale had gone forward
7 until January 18, 2011, and were not even aware a sale had been scheduled for January 13,
8 2011. (*See, e.g.*, Wright Depo. 7/25/12 at 161:13-163:9); Lockett Depo. at 217:3-12, Lockett
9 Depo. Ex. 15 (“We want to continue trying to get a loan modification but we cannot risk losing
10 the house.”).) The Consolidated Notes Log, however, reflect several calls on January 13, 2011,
11 that appear to be from Plaintiffs, rather than Ms. Lockett. (Consolidated Notes Log at 30-31.)

ANALYSIS

13 Plaintiffs assert claims against Defendants for wrongful foreclosure, promissory
14 estoppel, fraud, negligent misrepresentation, and violations of California Business and
15 Professions Code Section 17200 (the “UCL Claim”).³ Plaintiffs move for summary judgment
16 only on claims for wrongful foreclosure and violations of the UCL. Defendants cross-move for
17 summary judgment on those claims, and they move for summary judgment on the claims for
18 fraud, negligent misrepresentation and promissory estoppel.

A. Applicable Legal Standard.

20 Summary judgment is proper when a “movant shows that there is no genuine dispute as
21 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
22 56(a). “A party asserting that a fact cannot be or is genuinely disputed must support the
23 assertion by” citing to, *inter alia*, depositions, documents, affidavits, or other materials. Fed. R.
24 Civ. P. 56(c)(1)(A). A party may also show that such materials “do not establish the absence or
25 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to
26 support the fact.” Fed. R. Civ. P. 56(c)(1)(B). An issue is “genuine” only if there is sufficient

27
28 ³ The Court previously dismissed Plaintiffs’ claims for breach of contract,
negligence, and declaratory relief. It also dismissed Plaintiffs’ claims against LSI and Cal-
Western. (*See* Docket No. 48.)

1 evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty*
2 *Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is “material” if the fact may affect the
3 outcome of the case. *Id.* at 248. “In considering a motion for summary judgment, the court
4 may not weigh the evidence or make credibility determinations, and is required to draw all
5 inferences in a light most favorable to the non-moving party.” *Freeman v. Arpaio*, 125 F.3d
6 732, 735 (9th Cir. 1997).

7 The party moving for summary judgment bears the initial burden of identifying those
8 portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine
9 issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Where the
10 moving party will have the burden of proof on an issue at trial, it must affirmatively
11 demonstrate that no reasonable trier of fact could find other than for the moving party. *Id.*
12 Once the moving party meets this initial burden, the non-moving party must go beyond the
13 pleadings and by its own evidence set forth specific facts showing that there is a genuine issue
14 for trial. *See Fed. R. Civ. P. 56(e)*. The non-moving party must “identify with reasonable
15 particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275,
16 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995))
17 (stating that it is not a district court’s task to “scour the record in search of a genuine issue of
18 triable fact”). If the non-moving party fails to make this showing, the moving party is entitled
19 to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

20 **B. Evidentiary Issues.**

21 Relying on the sham affidavit rule, Plaintiffs ask the Court to disregard any evidence
22 submitted by Defendants that Wells Fargo was acting as Freddie Mac’s agent, because Wells
23 Fargo and Cal-Western previously submitted declarations stating that Wells Fargo was the
24 beneficiary under the Deed of Trust. (Plaintiffs’ Opp. Br. at 3:18-21.) The Court denies this
25 request. Even if Wells Fargo was not the actual beneficiary under the Deed of Trust,
26 Defendants have consistently taken the position that Cal-Western was properly substituted as
27 Trustee and, thus, had the power to conduct the Trustee’s Sale. Thus, Defendants’ agency
28 argument is not inconsistent with the position Defendants have taken throughout this litigation.

Defendants, in turn, rely on Plaintiffs' allegations in the FAC to argue that Plaintiffs have admitted that Wells Fargo was acting as Freddie Mac's agent. (Docket No. 99, Defs. Reply at 2:9-21.) "Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). In their FAC, Plaintiffs alleged that "Wells Fargo acted as the servicer of the Loan that was assigned to Freddie Mac and was acting as the agent for and under the authority of the true beneficiary under the Deed of Trust - Freddie Mac." (FAC ¶ 87.) Plaintiffs also alleged that "[a]t all times relevant, Freddie Mac was the true owner and beneficiary of the Loan and Wells Fargo acted as Freddie Mac's authorized agent in servicing the Loan" (*Id.* ¶ 92.) Plaintiffs admit that Wells Fargo acted as "Freddie [Mac's] agent, in the sense that it was servicer of the" loan. (Plaintiffs' Reply Br. at 3:6-10.) They argue, however, that allegations cannot be construed as judicial admissions that Wells Fargo "was authorized to act and/or was acting as" Freddie Mac's agent "as beneficiary." (Plaintiffs' Reply Br. at 3:6-11.) For the reasons discussed below, the Court concludes that there remain disputed issues of fact over the scope of Wells Fargo's agency and these judicial admissions do not conclusively establish that Defendants are entitled to judgment in their favor on the wrongful foreclosure claim.

Plaintiffs also ask the Court to disregard Defendants' evidence regarding Ms. Lockett's qualifications. The Court sustains Plaintiffs' objections to that evidence on the basis that the evidence bears only on Ms. Lockett's credibility.

C. The Court Denies the Cross-Motions for Summary Judgment on the Wrongful Foreclosure and UCL Claims.

Plaintiffs argue that they are entitled to summary judgment on the wrongful foreclosure claim because: (1) Freddie Mac became the beneficiary under the Deed of Trust when it purchased their Promissory Note and Deed of Trust from Wells Fargo; (2) Freddie Mac was the only entity that had the power to substitute a trustee to effectuate a trustee's sale; (3) Freddie Mac did not substitute Cal-Western as Trustee; (4) Cal-Western was not authorized to commence the foreclosure proceedings; and, as a result; (5) the Trustee's Sale was void.

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1 Defendants counter that Cal-Western was properly substituted as Trustee and assert that the
2 Trustee's Sale was valid.

3 It is undisputed that Wells Fargo sold its interest in the Promissory Note to Freddie Mac
4 in 2008. Plaintiffs do not contest the validity of the assignment of the Promissory Note from
5 Wells Fargo to Freddie Mac. Although Wells Fargo and Freddie Mac did not execute the
6 Assignment of Deed of Trust until January 13, 2011, that fact is immaterial. "The assignment
7 of a debt secured by mortgage carries with it the security." Cal. Civ. Code § 2396; *see also*
8 *Cockerell v. Title Ins. and Trust Co.*, 42 Cal. 2d 284, 291 (1954) ("Assuming for the moment
9 that the assignment of the note, secured by the third trust deed, was a valid assignment, no
10 further assignment of the deed of trust was necessary.") (citing Cal. Civ. Code § 1084);
11 *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553 (1969) (deed of trust is "a mere
12 incident of the debt it secures and that an assignment of the debt carries with it the security" and
13 "is inseparable from the debt") (internal quotations and citations omitted). Therefore, Freddie
14 Mac was the beneficiary under the Deed of Trust as of February 2008.

15 The crux of the parties' dispute is whether Cal-Western was the proper trustee at the
16 time it began foreclosure proceedings. Under California law, a trustee may be substituted by
17 the recording "of a substitution *executed and acknowledged by:* (A) *all of the beneficiaries*
18 *under the trust deed, or their successors in interest....*" Cal. Civ. Code § 2934a(a)(1)(A)
19 (emphasis added). In this case, the Deed of Trust contains a provision regarding substitution,
20 and it provides that "Lender, at its option, may from time to time appoint a successor trustee to
21 any Trustee appointed hereunder, *by an instrument executed and acknowledged by Lender* and
22 recorded in the office of the Recorder of the county in which the Property is located."). (Deed
23 of Trust at 16 § 24.) Although neither the statute nor the Deed of Trust expressly give another
24 entity the right to "execute and acknowledge" a Substitution of Trustee, they also do not
25 expressly preclude an attorney-in-fact from executing a Substitution of Trustee. *See Aceves v.*
26
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1 *U.S. Bank, N.A.*, 192 Cal. App. 4th 218, 232 (2011) (noting that statute does not preclude
 2 attorney-in-fact from signing substitution on behalf of beneficiary).⁴

3 According to the record, when Wells Fargo granted Cal-Western a limited power of
 4 attorney, it granted Cal-Western the power to execute and acknowledge Substitution of Trustee
 5 where Wells Fargo was either a beneficiary or the servicing agent for a beneficiary. (Wheeler
 6 Decl., Ex. A.) It is undisputed that Wells Fargo was servicing the loan on Freddie Mac’s
 7 behalf, and Plaintiffs admit that Wells Fargo acted as Freddie Mac’s agent in that respect.
 8 (Meyer Decl., Ex. A; FAC ¶¶ 87, 92.) However, the Court concludes that neither Plaintiffs nor
 9 Defendants have met their burden to show that the issue of the scope of Wells Fargo’s agency
 10 can be resolved as a matter of law on this record. Rather, there remain disputed issues of fact as
 11 to whether Wells Fargo was authorized to Freddie Mac’s agent for purposes of executing the
 12 Substitution of Trustee.

13 On the one hand, Wells Fargo’s Vice-President of Loan Documentation attests that, “as
 14 the loan servicer, Wells Fargo was Freddie Mac’s authorized agent for purposes of the non-
 15 judicial foreclosure process.” (Overton Decl., ¶ 8.) On the other hand, Plaintiffs have
 16 submitted excerpts from Freddie Mac’s Single Family Seller/Servicer Guide, which states that
 17 “[u]nder the Purchase Documents, the Servicer contracts with Freddie Mac as an independent
 18 contractor to service Mortgages for Freddie Mac. The Servicer is *not* Freddie Mac’s agent or
 19 assignee.” (Docket No. 96, Declaration of Phillip Vermont in Opposition to Motion for
 20 Summary Judgment (“Vermont Opp. Decl.”), ¶¶ 3-5, Exs. 1-2.)

21 Accordingly, the Court DENIES the cross-motions for summary judgment on the
 22 wrongful foreclosure claim.

23
 24 ⁴ Defendants rely on a number of cases in which MERS was the nominee of the
 25 original lender, and its successors, and was expressly granted the authority in the deed of
 26 trust to take a variety of actions, including substituting the trustee. See, e.g., *In re Cedano*,
 27 470 B.R. 522, 532 (9th Cir. BAP 2012) (“Numerous cases have held that, as the nominee for
 28 the lender under a deed of trust, MERS has the authority to substitute a trustee”); *Bascos v.
 Federal Home Loan Mortgage Corp.*, 2011 WL 3157063, *5 (C.D. Cal. July 22, 2011)
 (same, citing cases). The Court does not find these cases helpful, because this is not a case
 where MERS was named as nominee, and, as noted, the Deed of Trust does not expressly
 identify any other agent who might be authorized to act on the beneficiary’s behalf.

1 **D. The Court Grants Defendants' Motion for Summary Judgment on the Fraud,
2 Negligent Misrepresentation, and Promissory Estoppel Claims.**

3 Plaintiffs' claims for fraud, negligent misrepresentation, and promissory estoppel each
4 arise out of Plaintiffs' allegations that: (1) Wells Fargo told Plaintiffs they were pre-qualified
5 for a loan modification, with specific terms; (2) Wells Fargo would not foreclose if Plaintiffs
6 sent it \$5,000; and (3) Wells Fargo would negotiate in good faith to modify the loan.⁵

7 **1. Fraud and Negligent Misrepresentation.**

8 In order to state a claim for fraud, Plaintiffs must allege facts showing that the
9 Defendants: (1) made a misrepresentation to Plaintiffs; (2) Defendants knew the representations
10 was false; (3) Defendants intended to induce Plaintiffs to rely on the misrepresentation; (4)
11 Plaintiffs justifiably relied on the misrepresentation; and (5) damages. *Lovejoy v. AT&T Corp.*,
12 92 Cal. App. 4th 85, 93 (2001) (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)).
13 "The same elements comprise a cause of action for negligent misrepresentation, except there is
14 no requirement of intent to induce reliance." *Caldo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th
15 513, 519 (2004).

16 Defendants move for summary judgment on the basis that Plaintiffs cannot show that
17 Defendants made any misrepresentations to them or that they relied on any such representations
18 to their detriment. At the hearing, Plaintiffs clarified that, in January 2011, they would have
19 cured their default had they known Defendants intended to proceed with the foreclosure and
20 they put forth evidence that supports their ability to do so. (See Wright MSJ Decl., ¶¶ 10, 12-
21 13, Ex. G-1; *see also* Lockett Depo., Ex. 15.) Although Plaintiffs have put forth evidence that
22 would create a genuine issue of disputed fact on the element of detrimental reliance, the Court
23 finds they have not met their burden to establish that Defendants made any misrepresentations
24 to them.

25
26 ⁵ Plaintiffs seek to hold Freddie Mac liable on these claims on the basis that
27 Wells Fargo "acted as Freddie Mac's authorized agent in servicing the loan." (See FAC ¶¶
28 92, 95, 102.) In light of this theory, although it is undisputed that the only communications
Plaintiffs had were with Wells Fargo, the Court shall use the term "Defendants" in its
analysis. In addition, there are no disputes about the scope of Wells Fargo's agency on these
claims.

1 **1. Representations Regarding a Loan Modification.**

2 At the hearing, Plaintiffs acknowledged that Defendants' statements about the loan
3 modifications were conditional, and there is no evidence in the record from which a reasonable
4 juror could find that Defendants stated to Plaintiffs that they would modify the loan. (*See, e.g.*,
5 10/20/10 Tr. at 37:22-25, 38:10-12; Wright MSJ Decl., Ex. D-1; Locket Depo. Ex. 15 ("We
6 need a written agreement before sending them any more money.").)

7 **2. Representations Regarding Foreclosure Proceedings and Good Faith
8 Negotiations.**

9 Plaintiffs rely on a letter dated October 20, 2010, to support their claim that Defendants
10 promised not to foreclose so long as they were in active negotiation for a loan modification, if
11 Plaintiffs sent a payment of \$5,000. (Wright MSJ Decl., ¶¶ 6, 9, Ex. D-1.) This letter is similar
12 to a letter that Defendants sent Plaintiffs in April 2010. (Wright TRO Decl., ¶ 8, Ex. C.) In
13 those letters, Defendants stated that "*Please note that until you are approved for a modification,*
14 *normal default servicing will continue which includes any foreclosure action that may be in*
15 *process.* Foreclosure action will not be placed on hold until you have returned the signed
16 agreement and the required initial payment." (*Id.*; Wright MSJ Decl., Ex. D-1 (emphasis
17 added).) Contrary to Plaintiffs' argument, these letters suggest that Defendants could - and
18 would - proceed with foreclosure "until" Plaintiffs were "approved for a modification." It is
19 undisputed that Defendants never approved a modification for Plaintiffs' loan. Moreover, there
20 is evidence in the record that Plaintiffs understood that it was possible that Defendants would
21 sell the Property. In an email dated January 17, 2011, Wright advised Lockett that "[w]e need a
22 written agreement before sending them any more money. Preferably one saying they are not
23 going to sell the house." (Locket Depo., Ex. 15.)

24 Plaintiffs also argue that Defendants stated that they would negotiate with the Plaintiffs
25 in good faith. The evidence in the record suggests that, as of December 2010, Defendants
26 determined that Plaintiffs would not qualify for a loan modification. (Overton Decl., ¶ 17, Ex.
27 H.) Plaintiffs do not put forth any evidence that would contradict that decision. The evidence
28 in the record also shows that up until December 2010, and for a short time thereafter,

1 Defendants attempted to work with Plaintiffs regarding their request for a loan modification.
2 Plaintiffs have not pointed this Court to any evidence from which a reasonable juror could
3 conclude that the Defendants were not negotiating in good faith.

4 Finally, Plaintiffs contend that Defendants told Ms. Lockett that the Trustee's Sale
5 scheduled for January 13, 2011 would not go forward. Wright attests that, on January 24, 2011,
6 he was told that Wells Fargo had granted the request for a postponement on January 18, 2011,
7 *after* the Trustee's Sale had gone forward. (Wright TRO Decl., ¶ 25.) In her declaration in
8 support of Plaintiffs' application for a temporary restraining order, Ms. Lockett attested that a
9 representative named Kevin told her the Trustee's Sale would not go forward. However, the
10 transcript of the recorded call shows that Kevin told her he could not guarantee that the request
11 for a postponement would be acted upon before the Trustee's Sale. (See 1/11/11 Tr. at 33:25-
12 34:1.) Ms. Lockett acknowledged in her deposition that the conversation did not reflect any
13 statement that the foreclosure sale had been postponed. (Locket Depo. at 228:8-14.)
14 Defendants also submitted the Log Notes from January 13, 2011, which reflect that Defendants
15 advised Ms. Lockett that the Trustee's Sale had not been postponed. (Overton Decl, Ex. J.) In
16 her declaration, Ms. Lockett attested that she had several conversations with Defendants'
17 representatives and that one of them told her the January 13, 2011 sale would not go forward.
18 (Lockett Decl., ¶¶ 22-23.) As a rule, in order to raise a fact issue for trial, the non-moving party
19 must present more than a "mere ... scintilla of evidence" to defeat a motion for summary
20 judgment. *Anderson*, 477 U.S. at 252. The Court concludes that Plaintiffs have not put forth
21 evidence from which a reasonable juror could conclude that Defendants agreed not to go
22 forward with the Trustee's Sale scheduled for January 13, 2011.

23 For the reasons set forth above, the Court concludes that Plaintiffs have not met their
24 burden to show that there are genuine issues of material fact in dispute that Defendants made
25 any misrepresentations to them. Accordingly, Defendants are entitled to summary judgment on
26 the fraud and negligent misrepresentation claims.

27 **2. The Promissory Estoppel Claim.**

28

United States District Court
For the Northern District of California

1 To state a claim against the Defendants for promissory estoppel, Plaintiffs must allege
2 facts showing that: (1) Defendants made a promise that was clear and unambiguous in its terms;
3 (2) Plaintiffs relied on that promise; (3) Plaintiffs' reliance on the promise was reasonable and
4 foreseeable; and (4) Plaintiffs were injured as a result of their reliance on the promise. *Aceves*
5 *v. U.S. Bank, N.A.*, 192 Cal. App. 4th 218, 225 (2011). Defendants move for summary
6 judgment on this claim on the basis that: (1) Plaintiffs cannot show a clear and unambiguous
7 promise to either modify their loan or postpone the Trustee's Sale; and (2) Plaintiffs cannot
8 establish they relied on any alleged promise to their detriment.

9 In the *Aceves* case, upon which Plaintiffs rely, the court concluded that the plaintiff had
10 stated a claim for promissory estoppel on the basis that the defendant represented to her that it
11 would work to modify her loan if she did not convert a Chapter 7 bankruptcy proceeding into a
12 Chapter 13 bankruptcy proceeding. *Id.* at 226-27. The court found that promise was clear and
13 unambiguous and was sufficient to survive a demurrer. With respect to the element of reliance,
14 the court noted that in a Chapter 13 bankruptcy proceeding, plaintiff would have the option of
15 retaining the property. The court also noted that if the defendant worked with her to modify the
16 loan, she could obtain more favorable treatment from the defendant than she could during
17 bankruptcy proceedings, providing the plaintiff "with a compelling reason to opt for
18 negotiations with the bank instead of seeing bankruptcy relief." *Id.* at 227-228. Based on those
19 facts, the court concluded the plaintiff alleged facts to show it was reasonable and foreseeable
20 for her to have relied on the defendants' representations. *Id.*

21 The Court finds this facts and procedural posture of this case distinguish it from *Aceves*.
22 First, in *Aceves*, the court resolved a demurrer, rather than a motion for summary judgment.
23 Second, the *Aceves* court concluded the plaintiffs allegations were sufficient to show that
24 defendants agreed to "engage in negotiations toward a solution of her loan problems," if she
25 stopped pursuing relief in bankruptcy proceedings, and the issue of whether it fulfilled that
26 promise turned on whether "it did or did not negotiate." *Id.* The court also emphasized the
27 many rights and benefits the plaintiff gave up by choosing to forego the bankruptcy
28 proceedings. *Id.*

United States District Court

For the Northern District of California

1 Here, in contrast, there is no evidence that Defendants asked the Plaintiffs to forego any
2 particular course of conduct as a pre-requisite to negotiations. The Court also has considered
3 the letter dated October 20, 2010. As discussed above, Plaintiffs must present more than a
4 “mere ... scintilla of evidence” to defeat a motion for summary judgment. *Anderson*, 477 U.S.
5 at 252. Although Plaintiffs did send Defendants \$5,000, the evidence shows that the
6 Defendants did negotiate with Plaintiffs on a loan modification, until they determined the
7 Plaintiffs would not qualify for one. Even assuming Plaintiffs have set forth sufficient facts to
8 show detrimental reliance, for the reasons set forth above in connection with the fraud and
9 negligent misrepresentation claims, the Court finds Plaintiffs have not met their burden to
10 overcome Defendants’ motion for summary judgment on the claim for promissory estoppel.

CONCLUSION

12 For the foregoing reasons, the Court DENIES the parties’ cross-motions for summary
13 judgment on the wrongful foreclosure claim and UCL claim, and it GRANTS Defendants’
14 motion for summary judgment on the fraud, negligent misrepresentation, and promissory
15 estoppel claim.

16 The parties’ pretrial filings are due on January 14, 2013, and by separate order the Court
17 shall refer this matter to a Chief Magistrate Judge James for purposes of conducting a further
18 settlement conference in advance of the trial date.

IT IS SO ORDERED.

21 Dated: December 5, 2012



JEFFREY A. WHITE
UNITED STATES DISTRICT JUDGE

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